TOWN OF IGNACIO, COLORADO
v.
ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-64-A Decided July 6, 1999

Appeal from a statement of intent to acquire land in trust status.

Affirmed.

1. Indians: Lands: Trust Acquisitions

The Bureau of Indian Affairs has a responsibility to fully inform interested parties of its decisions. If the Bureau separates the analysis of a trust acquisition request under 25 C.F.R. §§ 151.10 and/or 151.11 from the document notifying interested parties of its decision, and does not provide interested parties with a copy of the analysis, the Board of Indian Appeals may be required to vacate the Bureau's decision or to order further proceedings before the Board, so that interested parties may address the analysis.

APPEARANCES: Dirk W. Nelson, Esq., Bayfield, Colorado, for the Town of Ignacio; Janet L. Spaulding, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Area Director; Sam W. Maynes, Esq., Durango, Colorado, for the Southern Ute Indian Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The Town of Ignacio, Colorado (Town), seeks review of a January 13, 1998, decision of the Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), stating the Area Director's intent to take five tracts of land into trust for the Southern Ute Indian Tribe (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

By Tribal Resolution No. 96-236, dated December 31, 1996, the Tribe requested that the United States take eight tracts of land into trust for it. Three of the tracts are not at issue here. The five tracts at issue are all located within the boundaries of the Town, which is itself located within the exterior boundaries of the Southern Ute Indian Reservation (Reservation). The tracts are described as: (1) the Hutchinson Purchase, Lots 18 and 19, Block 2; (2) the Hutchinson Purchase, Lots 14, 15, 16, and 17, Block 2; (3) the Four Corners Industries, Inc., Purchase, Lots 6, 7, 8, and 9, Block 13; (4) the Red Purchase, Lot 10, Block 13; and (5) the Wilcox Purchase, Lots 11, 12, and 13, Block 13. All of the tracts are in T. 33 N., R. 7 W., N.M.P.M, Town of Ignacio, La Plata County, Colorado. It appears that the Tribe acquired the six lots in Block 2 in 1974; Lots 6, 7, 8, and 9 in Block 13 in 1988; Lot 10 in Block 13 in 1991; and Lots 11, 12, and 13 in Block 13 in 1994. Together the tracts contain approximately 1.27 acres.

Pursuant to 25 C.F.R. Part 151, by separate letters dated February 6, 1997, BIA notified the Town, La Plata County (County), and the State of Colorado (State) of the Tribe's trust acquisition request. The Town expressed several concerns over the possible approval of the request. The County stated that it shared some of the Town's concerns, but did not raise separate objections. The State did not respond. After receiving requests from the Town and the County, BIA held an informational meeting on April 30, 1997, to discuss the trust acquisition process and the Town's concerns. On June 6, 1997, BIA denied the Town's request for a formal public hearing.

By letter dated January 13, 1998, the Area Director notified the Tribe of his intent to take the five tracts into trust status. The Area Director prepared a memorandum, also dated January 13, 1998, which discussed the criteria for evaluating trust acquisition requests set out in 25 C.F.R. § 151.10. A copy of the Area Director's notification letter was sent to the Town. There is no evidence that a copy of the memorandum was sent to the Town.

The Town appealed the Area Director's decision to the Board. The Town, the Area Director, and the Tribe filed briefs on appeal.

Discussion and Conclusions

Decisions as to whether to acquire land in trust are discretionary. In reviewing BIA discretionary decisions, the Board does not substitute its judgment for BIA's. Instead, it reviews such decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion

established in regulations." City of Eagle Butte, South Dakota v. Aberdeen Area Director, 17 IBIA 192, 196, 96 I.D. 328, 330 (1989). See also McAlpine v. United States, 112 F.3d 1429 (10th Cir. 1997); City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 103-04 (1999), and cases cited therein. In regard to BIA discretionary decisions, the appellant bears the burden of proving that the Area Director did not properly exercise his discretion. Lincoln City, 33 IBIA at 104, and cases cited therein.

However, the Board has full authority to review any legal challenges that are raised in a trust acquisition case. In regard to BIA's legal determinations, the appellant bears the burden of proving that the Area Director's decision was in error or not supported by substantial evidence. Lincoln City, 33 IBIA at 104.

The Town raises two legal challenges to the decision here. Its first legal challenge is that this trust acquisition request should be treated as an off-reservation acquisition under 25 C.F.R. § 151.11, rather than as an on-reservation acquisition under 25 C.F.R. § 151.10. 25 C.F.R. § 151.10 applies to trust acquisitions when the land to be acquired "is located within or contiguous to an Indian reservation, and the acquisition is not mandated." 1/ Section 151.11 applies when the land to be acquired "is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated."

The Town concedes that the five tracts are all located within the exterior boundaries of the Reservation. However, it cites the Act of May 21, 1984, Pub. L. No. 98-290, 98 Stat. 201, 25 U.S.C. § 668 note (Public Law 290), in arguing that this should be treated as an off-reservation acquisition. Section 3 of Public Law 290 defines the Reservation boundaries, and section 4 clarifies jurisdiction over lands within the Reservation. Section 5 of Public Law 290, "Jurisdiction over Incorporated Municipalities Within the Reservation," provides in pertinent part:

> The State of Colorado shall exercise criminal and civil jurisdiction within the boundaries of the town of Ignacio, Colorado, and any other municipality which may be incorporated under the laws of Colorado within the

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1/ In footnote 5, page 4, of its answer brief, the Tribe states that this trust acquisition may be mandated by 25 U.S.C. § 669. Because the Tribe did not raise this argument previously, and does not develop it on appeal, the Board does not address it. It notes, however, that this was one of the statutes which it cited in Todd County, South Dakota v. Aberdeen Area Director, 33 IBIA 110, 118 n.3 (1999), as a statute that "would require analysis of its specific provisions to determine whether it is 'mandatory' legislation under 25 C.F.R. § 151.10."

> Southern Ute Indian Reservation, as if such State had assumed jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), as amended by the Act of April 11, 1968 (82 Stat. 79).

The Act of August 15, 1953, is commonly referred to as Public Law 280. It authorized certain states to exercise criminal (18 U.S.C. § 1162) and civil (28 U.S.C. § 1360) jurisdiction over cases involving Indians in Indian country. As amended in 1968, Public Law 280 requires the consent of the tribe involved before a state can assume jurisdiction.

The Town contends:

> The jurisdiction afforded the Town under Public Law 290 makes those properties unique within the Reservation, and to the extent jurisdiction is granted under Public Law 290, those properties should be treated as if they were off Reservation lands. Public Law 290 gave the State and the Town a higher level of control over these lands than other Reservation lands.

Opening Brief at 2. The Town continues: "While these lands are within the exterior boundaries of the Southern Ute Reservation, they are located within the Town, and the provisions of Public Law 290 effectively remove them from the Reservation." Id. at 3.

Appellant cites no other support for this argument.

The Board disagrees with the Town that Public Law 290 "effectively remove[d]" land located within the Town from the Reservation. As noted above, Public Law 290 authorized the State to exercise criminal and civil jurisdiction within the Town as if the State had assumed jurisdiction under Public Law 280. As a practical matter, if Public Law 290 had removed the land within the Town from the Reservation, there would have been no need for it to grant authority over that land to non-Indian governments. It would have been particularly incongruous for it to grant such authority under Public Law 280.

The Town's argument is that section 5 of Public Law 290 removed land from the Reservation whose boundaries section 3 of the Act had just clarified. This is essentially a diminishment argument. The Supreme Court has held that Congressional intent to diminish a reservation "will not be lightly inferred," but must be clearly expressed. Solem v. Bartlett, 465 U.S. 463, 470 (1984). See also Hagen v. Utah, 510 U.S. 399 (1994); Atencio v. Albuquerque Area Director, 18 IBIA 126, 129-30 (1990), and additional Supreme Court cases cited therein. Obviously, Congress was well aware of how to make its intentions in regard to the boundaries

of the Reservation explicit. The Town cites nothing in Public Law 290 which clearly expresses an intent to diminish the just-clarified Reservation, or to exclude the lands within the Town from the Reservation. Furthermore, it cites no case which has held that the grant of jurisdictional authority over reservation lands by either Public Law 280 or 290 diminishes the reservation involved, or otherwise removes the lands from the reservation.

The Board rejects this argument, and holds that the Area Director did not err in analyzing this trust acquisition request under 25 C.F.R. § 151.10.

The Town's second legal challenge to the Area Director's decision is that BIA erred in failing to make a specific finding as to whether the tracts would be used for gaming purposes. The Town cites Village of Ruidoso, New Mexico v. Albuquerque Area Director, 32 IBIA 130, 139 (1998), in which the Board held: "In order to demonstrate that it has considered the relevant facts related to the purpose for which a proposed land acquisition will be used, BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property."

In Ruidoso, there was evidence that, despite its statements concerning how it intended to use the property it sought to acquire in trust, the tribe might actually be considering using the property for gaming purposes. Nothing in the present case suggests that the Tribe intends to use the tracts for anything other than their existing uses, which do not include gaming. The Board concludes that BIA did not err in not making a specific finding as to whether the tracts would be used for gaming purposes.

The Town's remaining arguments challenge the Area Director's exercise of discretion.

The Town contends that BIA failed to consider the trust acquisition request under the criteria set forth in 25 C.F.R. § 151.10. It argues that the Area Director's decision summarily concludes that the request complies with the relevant regulations and policy memoranda, but does not show any analysis supporting this conclusion. This argument makes it apparent that the Town does not have a copy of the Area Director's January 1998 memorandum containing his analysis of the trust acquisition request.

In May v. Acting Phoenix Area Director, 33 IBIA 125, 130-31 (1999), the Board considered a case in which BIA issued both a letter stating its intent to take land into trust, which was sent to all interested parties, and a memorandum containing the analysis under 25 C.F.R. § 151.10, which apparently was sent only to the tribe. The Board found that it was unclear which document was intended to be the decision, but concluded that the memorandum was the decision.

The notification letter in May specifically referenced the memorandum. The Board held that this reference put interested parties on notice of the existence of the memorandum and of the fact that it was "a critical document in the trust acquisition process." 33 IBIA at 131. It noted that the table of contents for the administrative record, which it sent to all interested parties, clearly listed the memorandum as being part of the record, and stated that the appellant could have requested a copy of the memorandum from either the Board or the Phoenix Area Director. The Board concluded that the appellant "must bear responsibility for its failure to know the contents of the memorandum." Id.

In this case, the Town was not placed on notice of the existence of the memorandum by the Area Director's notification letter. However, the table of contents for the administrative record listed Item No. 4 as "January 13, 1998, Area Office review memorandum to Southern Ute Agency." The description of the memorandum is not terribly illuminating, but is sufficient to raise a question about the contents of the memorandum. If the Town did not have a copy of this memorandum (or any other document in the record), it could, and should, have requested one from the Board. The Board concludes that the Town was on notice of the existence of the January 1998 memorandum.

[1] Although appellants before the Board bear the responsibility for acquainting themselves with materials in the administrative record, BIA also bears a responsibility for fully informing interested parties of its decisions. See, e.g., Bowen v. American Hospital Association, 476 U.S. 610 (1986); Stockbridge-Munsee Community v. Acting Minneapolis Area Director, 30 IBIA 285, 288-89 (1997), and cases cited therein. Not only are interested parties entitled to know the basis of a BIA decision, those parties might, with the benefit of such knowledge, be persuaded that BIA's decision is valid. If unnecessary appeals might be avoided simply by providing interested parties with complete and timely information about BIA's decision, there are potential advantages to all concerned, including the tribe or individual Indian whose trust acquisition request is at issue.

For all these reasons, it is important that BIA furnish its analysis to interested parties at the time it issues notice of its trust acquisition decision. In order to encourage BIA to do so in the future, barring extraordinary circumstances (such as, for example, those found in this case as discussed below), the Board will henceforth either vacate an Area Director's trust acquisition decision or require additional proceedings before the Board if it becomes apparent that BIA did not furnish the appellant with a copy of its analysis and the appellant has not subsequently obtained a copy.

Although the Board finds that there is no evidence that the Town obtained a copy of the January 1998 memorandum in this case, it declines either to vacate the Area Director's

decision or to require additional proceedings because it concludes that the Town was not prejudiced in preparing its appeal by its failure to have the memorandum. The Board finds that the Town raised both of the arguments it raises on appeal while this matter was pending before BIA, and that both of those arguments were addressed prior to the issuance of the Area Director's decision.

The Town's first argument is that BIA did not properly consider the loss of tax revenue to local governments, as required by 25 C.F.R. § 151.10(e). It contends that, while the tracts were owned by the Tribe in non-trust status, they were subject to a 1996 Taxation Compact (Compact) entered into by the State, the County, and the Tribe, but that, if the tracts are taken into trust, they will no longer be subject to the Compact and the Town "will experience a loss of revenues." Opening brief at 4.

The Compact referenced by the Town was negotiated in order to end protracted litigation among the State, County, and Tribe. It appears under Colo. Rev. Stat. § 24-61-102. The Compact provides that land owned by the Tribe on the Reservation will not be taxed whether that land is owned in trust (section 3.01) or non-trust status (section 3.03). In section 6.01, the Tribe agrees to make a payment in lieu of taxes for any non-trust land which it owns on the Reservation. Section 3.02 acknowledges that there will be a decline in the County's assessed valuation if the Tribe acquires lands in trust that were formerly taxable, and commits the State and Tribe

> to assist the county in exploring future cooperative efforts to mitigate the negative revenue impacts that may result from these tribal acquisitions on trust lands. Those cooperative efforts will include joint efforts at seeking federal or state assistance as required to mitigate those revenue impacts and other joint revenue raising efforts acceptable to the tribe, the state, and the county.

Colorado Rev. Stat. § 24-61-202 2/ requires the County to establish a fund for moneys to be used for mitigating the impacts described in section 3.02 of the Compact.

While this matter was pending before BIA, the Town raised several different arguments in regard to the economic impact of trust acquisition. It raised the same argument it raises in

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2/ No copy of this statute was included in the administrative record or the parties' submissions on appeal. The Board obtained a copy at http://web.intellinetusa.com/stat98/.

this appeal in a March 5, 1997, letter responding to the Superintendent's letter notifying it that BIA was considering a trust acquisition request from the Tribe. The County held a public hearing on March 24, 1997, to discuss the trust acquisition request. The administrative record contains a report of that meeting which shows that the existence and operation of the mitigation fund established under Colo. Rev. Stat. § 24-61-202 was discussed. Present counsel for the Town attended that meeting.

Subsequently, in a May 15, 1997, letter to the Tribal Chairman, the Town's Mayor acknowledged the existence of the mitigation fund and of the availability of funds from it for taxing districts adversely affected by a trust acquisition:

> By taking the current five properties listed by the B.I.A. as being under consideration for trust status, a minimal amount of revenue will be lost by the town and indeed that only if the town does not follow through as per the provisions of the Tax Compact signed by the tribe, county and state a year or so ago.

The Town has attempted to resurrect on appeal an argument which it conceded before BIA. The Board finds that the Town's continued disagreement over the analysis of any potential impacts based on revenue loss does not show that the Area Director did not consider the issue or improperly exercised his discretion in regard to this criterion.

The Town also contends that the Area Director failed to consider jurisdictional problems and potential land use conflicts, as required by 25 C.F.R. § 151.10(f). It argues that the fact that the land will not be subject to its land use controls or jurisdiction raises the possibility of conflicts in land use.

This is the same argument which the Town raised during the proceedings before BIA, and which was addressed on several occasions by both the Tribe and BIA. See, e.g., Letter of Apr. 18, 1997, from Tribal Chairman to Town's Mayor; Agenda for BIA's Apr. 30, 1997, informational meeting; Letter of June 3, 1997, from Tribal Chairman to the Town's Mayor.

The Board finds that the Area Director fully discussed jurisdictional problems and potential land use conflicts both in his January 1998 memorandum and in previous communications with the Town. The Town's argument on appeal shows that it continues to disagree with BIA's analysis, but fails to show that the Area Director did not consider the issue or improperly exercised his discretion with respect to this criterion.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Albuquerque Area Director's January 13, 1998, decision is affirmed.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge